OCT 7 1974

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-392

SUSANNE ORRIN,

Petitioner,

—v.—

SECRETARY OF THE TREASURY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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No.

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SECRETARY OF THE TREASURY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered on June 24, 1974.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals and the opinion of the District Court have not been reported, although the affirmance of the Court of Appeals is noted at 497 F.2d 684 (D.C. Cir. 1974). The memorandum opinion of the Court of Appeals is set out in the Appendix, infra p.2a. The opinion of the District Court is set out in the Appendix, infra pp.3a-15a.

JURISDICTION

The memorandum opinion and judgment of the Court of Appeals were entered on June 24, 1974. On September 21, 1974, Mr. Justice Stewart granted an extension for the filing of this petition to and including October 7, 1974. The jurisdiction of this Court to review the judgment below is conferred by 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS

This case involves the Trading with the Enemy Act, 50 U.S.C. App. § 5(b), and the Foreign Assets Control regulations, 31 C.F.R. §§ 500 et seq. Pertinent portions of the statute and regulations are set forth in the Appendix, infra. pp. 18a-25a.

QUESTIONS PRESENTED

1. Whether the Trading with the Enemy Act and the Foreign Assets Control regulations, which have been applied to require the licensing of publications emanating from North Vietnam, impose an unconstitutional restraint upon free speech and publication?

2. Whether the Act and the regulations, which provide no standards for an administrative official to issue or deny licenses for publications emanating from North Vietnam, are unconstitutionally arbitrary, broad and vague?

STATEMENT OF THE CASE

Petitioner, a citizen of the United States and a resident of the District of Columbia, was in Canada for a brief visit on July 9, 1969. When she returned to the United States at the international border at Niagra Falls, New York, her luggage was searched by Customs officers. They found three paperback books which had been published and printed in North Vietnam, namely, "The Vietnamese Problem" by L. Q. Ky, published by the Foreign Languages Publishing House, Hanoi, 1967; "North Vietnamese Medicine Facing the Trial of War," edited by Nguyen Hac Vien, published by Vietnamese Studies, Hanoi, 1967; and "Literature and

National Liberation in South Vietnam," author and publisher unknown. Each of the books was seized and retained by the Customs Officers, notwithstanding a request that they be returned. (App. 3a, 4a.)

Petitioner was requested to execute a "Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction." She refused to sign the waiver, insisting upon the return of the books. Instead, the books were retained by Customs officers and were subsequently burned on or about July 9 in the belief by such officers that they could be properly destroyed without further proceedings. No hearing was afforded prior to the seizure or destruction of the books. (App. 4a, 5a.)

Petitioner thereafter filed a complaint in the United States District Court below in which she alleged the facts set forth above and sought a judgment declaring that the seizure of the three paperback books in question violated the freedoms of speech and press assured by the First Amendment, and that the possession of the books upon her return to the United States was "not included within the coverage of the Trading with the Enemy Act." She also sought restitution of such books by the Secretary of the Treasury. (App. 5a.)

Upon cross motions for summary judgment, the District Court entered judgment for the Secretary of the Treasury and

denied judgment for petitioner. (App. 3a-17a.) That judgment was affirmed by the Court of Appeals. (App. 1a-2a.)

REASONS FOR GRANTING THE WRIT

A. THE TRADING WITH THE ENEMY ACT AND THE FOREIGN ASSETS CONTROL REGULATIONS IMPOSE AN UNCONSTITUTIONAL PRIOR RESTRAINT UPON FREE SPEECH AND PUBLICATION.

The core of the constitutional protection under the First Amendment is that no prior restraint may be imposed on speech or press. Near v. Minnesota, 382 U.S. 697 (1931). As recently as Organization For A Better Austin v. Keefe, 402 U.S. 415 (1971), this Court reiterated the rule that "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." 402 U.S. at 419 (citations omitted).

It is no answer here that the licensing scheme of the Trading with the Enemy Act and of the Foreign Assets Control regulations is intended to prevent the flow of economic benefit to the proscribed countries for it is rare that a substantial governmental interest is not asserted in the context of a forbidden prior restraint, see, e.g., Procunier v. Martinez, 40 L.Ed.2d 224 (1974)(preservation of order and discipline, maintenance of institutional security

against escape, and rehabilitation of prisoners); Healy v. James, 408 U.S. 169 (1972) (prevention of disruptive student activities); New York Times Company v. United States, 403 U.S. 713 (1971)(preservation of "secret" information); Carroll v. Princess Anne, 393 U.S. 175 (1968)(prevention of violence); Freedman v. Maryland, 380 U.S. 51 (1965)(suppression of obscenity).1/

Similarly, it is no answer here that the petitioner is a recipient of communication and thus unprotected by the First Amendment, for this Court last Term in Procunier v. Martinez, supra, unaminously recognized the First Amendment rights of recipients and potential recipients of intended communication from "unjustified governmental interference with intended communication. Lamont v. Postmaster General, 381 U.S. 301 (1965)." 40 L.Ed.2d at 237.

1/ Quite opposed to the prior restraints noted above is a situation such as was present in United States v. O'Brien, 391 U.S. 367 (1968), the case relied upon by the District Court below, where this Court sustained not an administrative prior restraint but a criminal statute restricting not pure speech or press but "non speech" elements in a single course of conduct. These distinctions were firmly noted last term in Procunier v. Martinez, supra, where the Court held O'Brien inapplicable to administrative prior restraints on intended recipients of protected communication.

The Court of Appeals below, however, relied heavily upon two cases where this rejected reasoning was applied, Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, 459 F.2d 676 (3d Cir.), cert. denied, 409 U.S. 933 (1972) and Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969). In those cases, the respective Courts of Appeals upheld the governmental seizure of publications under the Trading with the Enemy Act and the Foreign Assets Control regulations against challenges by intended recipients of those publications. In neither case, however, did the courts fully recognize the First Amendment rights of intended recipients, a consideration which may have prompted three Justices of this Court to vote in favor of granting certiorari in Teague.

In Procunier v. Martinez, supra, this Court laid to rest the less-than-equal treatment previously extended to intended recipients of First Amendment communication. In a unanimous opinion by Mr. Justice Powell, the Court, after noting the presence of substantial governmental interests, held that First Amendment rights:

> "[Do] not depend upon whether the [outside] correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from

> the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication." 40 L.Ed.2d at 237 (citations omitted).

The unjustified governmental interference with the First Amendment rights of recipients required by the licensing scheme at issue in the instant case is particularly offensive as a prior restraint: it imposes an impermissible burden on recipients or importers and it causes an undue delay in the delivery of protected publications; it requires recipients to abandon their anonymity in a sensitive political area; and it places the burden of proof on the recipients to establish their right to receive or to import protected communication.

1. THE REGULATIONS IMPOSE AN UNCONSTITUTIONAL BURDEN AND DELAY.

In order to obtain a detained publication, the recipient or importer must seek a license application form, complete it, mail it to the appropriate Federal Reserve Bank, await a license, and then present the license to the Regional Commissioner of Customs. The resulting delay is obvious. And as the facts in this case make clear, there is a grave risk that the imported publications will be unlawfully destroyed in the interim. Additionally, if the recipient or importer is unfamiliar with the regulations, there would be further burden and delay in

obtaining the licenses necessary for receipt of protected publications.

The delays occasioned by the filing and processing of applications for the necessary licenses are not inconsequential. In Teague v. Regional Commissioner of Customs, supra, the Second Circuit concluded that Foreign Assets Control would process licenses in about ten days. 404 F.2d at 446. But in Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, supra, the Third Circuit observed that "the Notice of Detention contemplates 45 days, which may be extended to a maximum of ninety days." 459 F.2d at 682. And in American Documentary Films, Inc. v. Secretary of the Treasury, 344 F.Supp. 703 (S.D.N.Y. 1972), the application was made on March 17, 1972 and the license was initially denied on May 4, 1972.

Especially in circumstances as in the present case, where the publications are lacking in great monetary value, it is unlikely that any person will make the effort to apply for a license. Thus, whatever the intent of the regulations, they have the effect of an outright prohibition upon First Amendment communication.2/

2/ This form of prior censorship is well illustrated by the instant case and by similar cases discussed above. In addition to Teague, Veterans and Reservists for Peace in Vietnam, and American Documentary Films, cited supra, see, Welsh v. Schultz, 482 F.2d

This Court has consistently struck down legislation which imposes even modest delays on the exercise of First Amendment rights. Freedman v. Maryland, 380 U.S. 51 (1965); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968); Carroll v. Princess Anne, 393 U.S. 175 (1968); Blount v. Rizzi, 400 U.S. 410 (1971); cf. United States v. Thirty Seven Photographs, 402 U.S. 363 (1971) (statute construed to save its constitutionality). And as this line of cases makes clear, the constitutional defect is even more patent where the burdens of initiating the process and carrying it forward to judicial review are on the applicant for a license rather than the government authority. See, e.g., Freedman v. Maryland, supra.

Particularly relevant is Lamont v. Postmaster General, 381 U.S. 301 (1965), holding that the requirement of checking a box on a postage-free postcard, much less of a burden than required here, was an unconstitutional imposition on the receipt of protection communication. The district court below attempted to distinguish Lamont by relying on the statement in Mr. Justice Brennan's concurring opinion, 381 U.S. at 308-309, that in Lamont there was no compelling governmental interest in the regulatory scheme there in issue. Any reliance

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780 (D.C. Cir. 1973), modifying and remanding Welch v. Kennedy, 319 F.Supp. 945 (D.D.C. 1970); Baltimore Yearly Meeting of Society of Friends v. Rusk, Civil No. 20136 (D.Md. 1972).

on that statement, however, is altogether misplaced as it was adopted by only two of the eight Justices of this Court who participated, with the other six Justices declining to accept such a limitation. Moreover, Lamont was extended last Term in Procunier v. Martinez, supra, to prevent an undue burden from being placed upon an intended recipient of First Amendment communication despite the presence of compelling governmental interests. And notably, the governmental interests in Martinez were considerably more substantial than whatever governmental interest could be advanced here to support the burdens placed upon a recipient of three paperback books. Those burdens simply cannot be sustained under Martinez and Lamont.

2. THE REGULATIONS UNCONSTITUTIONALLY STRIP IMPORTERS AND RECIPIENTS OF THEIR FIRST AMENDMENT RIGHT TO ANONYMITY.

Implicit in the licensing procedure is the maintenance of permanent files containing information about persons who have disclosed their wish for publications from what the Third Circuit referred to as the "enemy." Veterans and Reservists, supra, 459 F.2d at 681. Although that Court conceded the problem to be "troublesome," and went to the unusual length of indicating its wish that the records would be kept confidential, 459 F.2d at 683, there is no assurance whatsoever that any attempt is made to maintain secrecy. Moreover, the records may be public within the meaning of the Freedom of

Information Act, 5 U.S.C. §552(a)(2)(A), and they are undoubtedly subject to examination by congressional committees and investigatory agencies.

Contrasted with this severe loss of political anonymity is this Court's repeated recognition of the fundamental right to anonymity in political activity. Talley v. California, 362 U.S. 60 (1960); Zwickler v. Koota, 389 U.S. 241 (1967); id., 290 F.Supp. 244 (E.D.N.Y. 1968), reversed on other grounds sub nom. Zwickler v. Golden, 394 U.S. 103 (1968); cf. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958). It seems basic that the passive recipient or the casual importer of several publications should be entitled to at least the same protection as that provided to a major publisher. And even if the likelihood of disclosure were not great, the fear of lost anonymity is real, as is the resultant deterrent to the exercise of fundamental rights. Lamont v. Postmaster General, supra.

3. THE REGULATIONS IMPOSE AN UNCONSTITUTIONAL BURDEN OF PROOF ON THE APPLICANT FOR A LICENSE.

The regulations impose upon the recipient the burden of proving that the publications are in fact bona fide gifts or are otherwise eligible for licensing. No such burden is permissible as a condition for the exercise of fundamental rights. Speiser v. Randall, 357 U.S. 513 (1958). See, e.g., Freedman v. Maryland, supra. This burden

is a particularly compelling consideration since unlicensed payment for publications is a felony under the Act, and since the regulations place upon the citizen the burden of proving that he has not committed a crime.

The Third Circuit, in an exercise of wishful thinking, suggested that it should be sufficient for the applicant simply to declare that he has made no payment. Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, supra, 459 F.2d at 683. At no time, however, has the government indicated that Foreign Assets Control will accept such a statement, and the requirement in the regulations that Foreign Assets Control must be "satisfied" belies such a conclusion. 31 CFR §500.204 App. (108). Indeed, it is clear from the facts of American Documentary Films, Inc. v. Secretary of the Treasury, supra, that Foreign Assets Control will not accept such a statement. There, a definitive statement was made that the films were a gift. Nevertheless, the District Court sustained denial of the license in part because the applicant did not provide additional information which might have enabled Foreign Assets Control to conduct a cumbersome independent investigation including the questioning of persons residing in Canada.

B. THE ACT AND REGULATIONS ARE UNCONSTITUTIONALLY ARBITRARY, BROAD AND VAGUE.

Where government action infringes upon basic rights, several factors must be considered. These include the nature of the governmental interest, the nature of the right infringed, and the availability of less drastic measures to achieve the same ends. United States v. O'Brien, 391 U.S. 367 (1968); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Shelton v. Tucker, 364 U.S. 479 (1960). And of course it is fundamental that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." Procunier v. Martinez, 40 L.Ed.2d at 240 (1974).

Whatever the governmental interest may be in restricting the flow of currency to North Vietnam and North Korea, even completely unrestricted trade in films and publications would be de minimis. This reality is emphasized by the Foreigh Assets Control regulations which permit the massive importation of books and films from North Vietnam if they are approved by the Library of Congress or the National Science Foundation for universities, libraries, and scientific and research institutions, without restrictions as to shipment or method of payment. 31 C.F.R. §500.204 App. (108). Conceding such a broad exception from economic regulation by Foreign Assets Control,

the government is estopped from asserting a compelling necessity for imposing a cumbersome licensing procedure on a recipient of three paperback books requiring affirmative proof that they are gifts or that payment has been made into blocked domestic bank accounts.3/

It is not just the arbitrary coverage of the regulations which offend the First Amendment. They also suffer from the basic infirmity of lacking any standards by which Foreign Assets Control may determine whether or not to grant licenses. The regulations grant power to an administrator to issue licenses for any reason whatever, and to deny a license to anyone who would be entitled to act under the provisions of one of the general exemptions contained in the regulations. 31 C.F.R. §500.503. This authorizes Foreign Assets Control to deny a license for the importation of publications, even if it were proved that they

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3/ This unequal application of governmental economic regulation of course raises not only serious First Amendment questions, but also equally serious equal protection and due process considerations, see, Police Department v. Mosley, 408 U.S. 92 (1972); Williams v. Rhodes, 393 U.S. 23 (1968); cf., Morey v. Doud, 354 U.S. 457, 465 (1957).

were bona fide gifts.4/ The statute gives no hint of a congressional policy by which the administrator may be guided, for it simply permits limitless prohibition or regulation of transactions relating to "any property in which any foreign country or a national thereof has any interest," 50 U.S.C. App. §5(b)(1)(B).

Where, as here, an administrative censor or licensing agent is involved, the vice of vagueness is especially suspect. E.g., Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 683 (1968). Moreover, regulations which affect speech and press must be precisely and narrowly drawn and clearly authorized. Procunier v. Martinez, supra; Schneider v. Smith, 390 U.S. 17 (1968); Shelton v. Tucker, supra; Kent v. Dulles, 357 U.S. 116 (1958). These regulations, in their grant of uncontrolled discretion to an administrative censor, do not meet that test. And it is doubtful that they have been authorized by the statute. But if the regulations are within the scope permitted by the statute, it too must fall.

4/ The absence of any standards as to the requisite proof necessary to establish the status of communication as a gift is aptly demonstrated by American Documentary Films, Inc., v. Secretary of Treasury, 344 F.Supp. 703 (S.D.N.Y. 1972). See p. 13, supra.

C. THE STATUTE SHOULD BE CONSTRUED TO AVOID CONSTITUTIONAL DOUBT.

In reviewing legislative or executive acts which have been applied in a manner so as to raise substantial constitutional doubt, this Court has repeatedly held that "such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." The Japanese Immigrant Case, 189 U.S. 86, 101 (1903); see also, Schneider v. Smith, 390 U.S. 17, 26 (1968) citing a "stream of authority." This cardinal rule of statutory interpretation is particularly appropriate where First Amendment rights have been restricted. United States v.Thirty Seven Photographs, 402 U.S. 363 (1971).

In the instant case, this approach was ignored by the courts below. There can be little doubt, however, that the statute, and therefore the regulations, were intended to regulate commercial transactions only, and that any infringement of First Amendment rights is beyond their reach. By so construing the statute, no substantial aspect of the program would be impeded, and fundamental rights would be preserved.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 7, 1974

APPENDICES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

lo. 72-1621 **September Term, 1973**

Civil 2408-69

sanne Orrin, Appellant

v.

cretary of the Treasury

PEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: Bazelon, Chief Judge, Robb, Circuit Judge and Van Pelt,*
United States Senior District Judge for the District of Nebraska

J U D G M E N T

This cause came on to be heard on the record on appeal from
e United States District Court for the District of Columbia and
s argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that the judgment of
e District Court appealed from in this cause is hereby affirmed,
r the reasons set forth in the attached memorandum.

Per Curiam
For the Court

Hugh E. Kline
Clerk

tting by designation pursuant to 28 U.S.C. § 294(d)

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 24 1974

HUGH E. KLINE
CLERK

No. 72-1781 - Orrin v. Secretary of the Treasury

Plaintiff brought this action against the defendant Secretary challenging the legality of the seizure, by Treasury Department customs inspectors, of certain books that plaintiff attempted to bring from Canada to the United States without a license as required by the Department's Foreign Assets Control Regulations, 31 C.F.R. §§ 500.201 et seq. Plaintiff sought, inter alia, (1) restitution of the siezed publications and (2) a judgment declaring either that certain provisions of the Trading with the Enemy Act, 50 U.S.C. App. § 5(b), pursuant to which the Regulations had been promulgated, are unconstitutional as applied in this case, or that the Act, narrowly construed to avoid alleged constitutional infirmities, did not authorize seizure of the publications in question. On the points relevant here, the District Court denied plaintiff's motion for summary judgment and entered judgment for the defendant.

We are in substantial agreement with the views expressed by the District Court in its memorandum opinion, C.A. No. 2408-69, dated April 27, 1972, and also with the opinions, dealing with substantially the same questions as here presented, by the Second Circuit in Teague v. Regional Commissioner of Customs, 404 F.2d 441 (1968), cert. denied, 394 U.S. 977, rehearing denied, 395 U.S. 930 (1969), and by the Third Circuit in Veterans and Reservists for Peace in Vietnam v. Regional Commissioner of Customs, 459 F.2d 676, cert. denied, 409 U.S. 933 (1972).

Accordingly, we affirm the judgment of the District Court.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSANNE ORRIN	*	
Plaintiff	*	
v.	*	Civil Action No. 2408-69
SECRETARY OF THE TREASURY	*	
Defendant	*	

MEMORANDUM OPINION

This proceeding involves an application of the Trading with the Enemy Act 1/ and regulations 2/ promulgated pursuant to the provisions of that Act.

The plaintiff, Susanne Orrin, a citizen of the United States, sought to reenter the United States at Niagara Falls, New York, following a brief sojourn in Canada. While declaring only personal effects she was subject to further customs inspection and was detained by officials who searched her luggage. Found among that luggage were three

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1/ 55 Stat. 839, 50 U.S.C.App. § 5(b) (1941).

2/ Foreign Assets Control Regulations, 31 C.F.R. Part 500. et seq. (1950).

paper back books published and printed in North Viet-Nam 3/ together with an appointment book containing her engagements and other personal entries. All were seized by customs agents. The appointment book was copied by the agents and immediately returned to her. The three publications were retained by the officers. Plaintiff refused a request to sign a waiver, "Notice of Abandonment and Assent to Forfeiture of Prohibited or Seized Merchandise and Certificate of Destruction" on which the officers listed the titles of the publications. She did, however, accept a copy of the unsigned form and was informed by the officials that the three books were seized and detained in the absence of a Treasury Department license authorizing their importation under the authority of the Foreign Assets Control Regulations 4/ of of the Department. Plaintiff demanded the return of her property and was denied the publications. The appointment book was returned only after a photostatic copy

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3/ L.Q.Ky, The Vietnamese Problem, Foreign Language Publishing House, Hanoi, 1967; Nguyen Hac Vien, North Vietnamese Medicine Facing the Trial of War, Vietnamese Studies. Hanoi, 1967; and Literature and National Liberation in South Viet-Nam (author and publisher unknown).

4/ 31 C.F.R. 500.204.

of each page was made and retained by the customs agents.

The paper back publications were of nominal value and were mistakenly and unlawfully destroyed by the customs agents, under the belief that they were clothed with such authority. The plaintiff had not applied for a license at any time prior or subsequent to the attempted importation of the publications in question.

Plaintiff brings this action against the Secretary of the Treasury claiming that a search of her personal effects without a warrant, by customs inspectors on the American-Canadian border violated her constitutional rights. She also sought restitution of the three books seized and destroyed; 5/ a declaration that (a) the Trading with the Enemy Act was unconstitutional as to her (b) her possession of the books was outside the provisions of that statute and (c) the defendant be restrained from maintaining any copies of her appointment book or any of its pages.

5/ The basis of this action, according to the government, was the authority of customs officials to destroy small amounts of Chinese-type food stuffs in cases where a license for importation does not accompany the merchandise. It is apparent that restitution of the destroyed publications is impossible.

Presented for determination by the Court are cross-motions for summary judgment. For purposes of the motions, plaintiff's counsel agreed to treat the books as merchandise imported from Canada and no proof to the contrary was submitted to the Court.

The Court concludes the border search was legal and properly performed; the Trading with the Enemy Act is constitutional and does not violate plaintiff's First and Fifth Amendments rights; the seizure of the three books, published and printed in North Viet-Nam was proper and within the statutory power delegated to the customs officials. The Court further concludes that seizure of plaintiff's personal diary was clearly improper and outside the ambit of the statute. Summary judgment is granted to the defendants and denied to the plaintiff.

The legality of the search of the plaintiff's personal effects upon her return to the United States from Canada cannot be successfully controverted. Customs officers have broad authority to conduct border searches without obtaining a search warrant and without the need for establishing probable cause. 6/

6/ 46 Stat. §§727, 748, 19 U.S.C. §§1496, 1582 (1930). See also Thomas v. United States, 372 F.2d 252 (5th Cir. 1967). United States v. Castle, 409 F.2d 1347 (9th Cir. 1969).

Section 5(b) of the Trading with the Enemy Act authorizes the President, during the period of war or any other period of national emergency to regulate or prohibit transactions "involving any property in which any foreign country or a national thereof has an interest." Powers conferred upon the President by the Act were delegated to the Secretary of the Treasury 7/ who then delegated his authority under Section 5(b) to the Director of the Office of Foreign Assets Control. 8/ On December 16, 1950 President Truman declared the existence of a national emergency. 9/ The continued existence of this national emergency was recognized by Presidents Eisenhower, Kennedy and Johnson. 10/

The current Foreign Assets Control Regulations, 31 C.F.R. Part 500, were issued on December 17, 1950, incident to the national

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7/ 7 Fed. Reg. 1409 (1942).

8/ 32 Fed. Reg. 3472 (1967).

9/ 64 Stat. A 454, Proclamation No. 2914.

10/ President Eisenhower, Executive Order No. 10905, January 14, 1961, 3 C.F.R.; President Kennedy, Executive Order No. 11037, July 24, 1962, 3 C.F.R.; President Johnson, Executive Order No. 11387, January 1, 1968, 33 Fed. Reg. 47.

emergency declared by President Truman. Section 500.204 of the Regulations 11/ pro-

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11/ 31 C.F.R. §500.204 Importation of and dealings in certain merchandise.

(a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses, or otherwise, persons subject to the jurisdiction of the United States may not purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States specified in following subparagraph (1) of this paragraph, and they may not import into the United States merchandise specified in following subparagraphs (2), (3), or (4) of this paragraph:

(1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam. Articles which are the growth, produce or manufacture of these areas shall be deemed for the purposes of this chapter to be merchandise whose country of origin is China (except Formosa), North Korea or North Viet-Nam, notwithstanding that they may have been subjected to one or any combination of the following processes in another country . . . . (Emphasis added).

hibits the unlicensed purchase, transport, import, or other dealing in any merchandise outside the United States, if the country of origin of such merchandise is one of several foreign countries including North Viet-Nam.

The Trading with the Enemy Act and its implementing regulations do withstand constitutional scrutiny, and have so in the past.12/ Through the act and regulations, financial and economic controls have been adopted to prohibit and eliminate unlicensed transactions, direct or indirect, between Americans and North Vietnamese. The controls are intended to eliminate the flow of American currency to North Viet-Nam

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12/ The statute and regulations, together with the enactments which set up World War II controls and criminal convictions for violations, have repeatedly been upheld; Kaufman v. Societe Internationale, 343 U.S. 156 (1952); Zittman v. McGrath, 341 U.S. 471 (1951); Propper v. Clark, 337 U.S. 472 (1949); Silesian-American Corp. v. Clark, 332 U.S. 469 (1947); United States v. Von Clemm, 136 F.2d 968 (2d Cir. 1943); See also Teague v. Regional Commissioner of Customs, 404 F.2d 441 (2d Cir. 1968), cert. denied, 394 U.S. 977 (1969), reh. denied, 395 U.S. 930 (1969); Veterans and Reservists for Peace in Viet-Nam v. Regional Commissioner of Customs, et al., ___ F. Supp. ___, (E.D.Pa., Civil No. 70-1598, February 2, 1971); Welch v. Kennedy, 319 F. Supp. 945 (D.D.C. 1970).

and to prevent the North Vietnamese and the Vietcong from securing any economic benefit from transactions with Americans. Imports of publications from North Viet-Nam are allowed in this country,but they are subject to special licensing requirements which were not met by the plaintiff.

Plaintiff argues the statutes and regulations contain no prohibition against "non-commercial" 13/ importation and that since

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13/ While it is questionable that these books were being brought in for "commercial importation" as asserted by the government it is clear from 31 C.F.R. §500.801 that a license would be required in any case since the broad provisions of 31 C.F.R. §500.204 limit importation of "any merchandise." Therefore 31 C.F.R. 500.801(b) "specific licenses" appears to apply. 31 C.F.R. 500. 204 Appendix §108 states:

Publication and films from China, North Korea and North Viet-Nam.

Publications and films originating in mainland China, North Korea or North Viet-Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China, North Korea, and North Viet-Nam are also licensed without restrictions as to method of payment under programs approved by the Librarian of Congress or the National

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Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefit to designated countries or nationals thereof from the importations. (Emphasis added).

31 C.F.R. 500.801 states:

(a) General licenses. General licenses have been issued authorizing under appropriate terms and conditions, many types of transactions which are subject to the prohibitions contained in Subpart B. All such licenses are set forth in Subpart E. It is the policy of the Office of Foreign Assets Control not to grant applications for specific licenses authorizing transactions to which the provisions of an outstanding general license are applicable. Persons availing themselves of certain general licenses are required to file reports and statements in the form and in accordance with the instructions specified in the licenses.

(b) Specific licenses - (1) General course of procedure. Transactions subject to the prohibitions contained in Subpart B of this part which are not authorized by general license may be effected only under specific license.

the value of the books in question is approximately one dollar any economic benefit 14/ secured by North Viet-Nam is de minimus. The argument ignores the consistent treatment given by Courts in interpreting the Trading with the Enemy Act. In Welch v. Kennedy, 319 F. Supp. 945 (D.D. C. 1970), a similar challenge to the statute and regulations was found unconvincing. Plaintiff's emphasis upon the non-commercial aspects of the attempted importation is misplaced since it has already been established the Act emcompasses all importation. In Welch, plaintiff also argued the statute

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14/ "The obvious purpose of the pertinent regulation is to prohibit the countries of North Korea, North Viet-Nam and Red China from deriving any economic benefit whatsoever from any transactions which they or their nationals might have with persons subject to the jurisdiction of the United States. In the present posture of United States diplomatic relations--or lack thereof--with these countries, the reasons for the policy are obvious and merit no extended discussion. In fact, plaintiffs do not appear to question the underlying policy, arguing only that when, as here, it is applied to the importation of publications from these countries, it is an unconstitutional infringement of First Amendment rights." (Emphasis added). Teague v. Regional Commissioners of Customs (S.D.N.Y. 1967). Unreported Op. No. 66, Civil 4543.

could only be interpreted as evidencing congressional intent to regulate only commercial transactions. The Court held "such an interpretation would be inconsistent with the broad purpose of the Act, which was to give the President full power to conduct economic warfare against belligerent nations in time of war or national emergency." 15/

The cases cited to support plaintiff's challenge of the constitutionally of the statute and regulations are not in point.

In Lamont v. Postmaster General, 381 U.S. 301, at 309 (1965) the solicitor general conceded that no compelling government interest required enactment of the statute in question. In the present situation, the purposes are obviously more substantial and there is a compelling national interest. 16/

Our Courts have traditionally exercised care and caution in the area of First Amendment rights especially where there is a possible prior restraint upon such rights. The Supreme Court has stated:

> that when "speech" and "nonspeech" elements are combined in the same course

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15/ Welch v. Kennedy, 319 F. Supp. 945, at 946-47 (D.D.C. 1970).

16/ Teague v. Regional Commissioner of Customs, supra note 14.

> of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. O'Brien, 391 U.S. 367, at 376-377, (1968).

The Court is sufficiently satisfied that regulation of the non-speech element is being effected in a narrow fashion so as to minimize any possible incidental limitation upon plaintiff's First Amendment rights.

The government's seizure of the plaintiff's appointment book and the copying of the pages was clearly illegal, unwarranted under the regulations, and apparently conceeded to be so by the government. Customs officials should be notified that the sta-

tutes and regulations in issue do not clothe them with such authority. The government may not retain any copies of the plaintiff's personal appointment book.

Barrington D. Parker (s)
United States District Judge

April 27, 1972

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Washington, D.C. 20530

Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUSANNE ORRIN	*	
Plaintiff	*	
v.	*	Civil Action No. 2408-69
SECRETARY OF THE TREASURY	*	
Defendant	*	

ORDER

Upon consideration of plaintiff's and defendant's cross-motions for summary judgment and in accordance with the Memorandum Opinion filed in this cause, it is this 27th day of April, 1972,

ORDERED that plaintiff's motion for summary judgment is denied and that defendant's motion for summary judgment is granted.

It is further ORDERED that the defendant shall return to the plaintiff any copies of her appointment book in its possession.

Barrington D. Parker (s)
United States District Judge

Copies to:

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Washington, D.C., 20530

Statute and Regulations

50 U.S.C. App. §5(b), in pertinent part, provides:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise --

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States;

* * * * *

(3)* * * * Whoever willfully violates any of the provisions of this subdivision or of any license, order, rule or regulation issued thereunder, shall, upon conviction, be fined not more than $10,000, or, if a natural person, may be imprisoned for not more than ten years, or both; * * *

The pertinent provisions of the Foreign Assets Control regulations, 31 C.F.R. Part 500. are:

§500.201 Transactions involving designated foreign countries or their nationals; effective date. (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the juris-

diction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of, any property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) The term "designated foreign country" means ***[China, North Korea, and North Viet-Nam.]

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§500.204. Importation of and dealings in certain merchandise. (a) Except as specifically authorized by the Secretary of the Treasury (or any person, agency or instrumentality designated by him) by means of regulations, or rulings, instructions, licenses or otherwise, no person subject to the jurisdiction of the United States may purchase, transport, import, or otherwise deal in or engage in any transaction with respect to any merchandise outside the United States specified in following subparagraph (1) of this paragraph ***(1) Merchandise the country of origin of which is China (except Formosa), North Korea, or North Viet-Nam.***

§500.204 Appendix.

(108) Publications and films from China, North Korea and North Viet Nam. Publications and films originating in mainland China, North Korea or North Viet-Nam are licensed for commercial importation provided all payments due to the suppliers are made into blocked accounts. Publications and films originating in mainland China, North Korea and North Viet-Nam are also licensed without restrictions as to shipment or method of payment under programs approved by the Librarian of Congress or the National Science Foundation for universities, libraries, research and scientific institutions. Such publications and films are also licensed in exchange for publications from the United States. Additionally, such publications and films are licensed when the Office of Foreign Assets Control is satisfied that they are bona fide gifts to the importers and that there is not and has not been since the effective date any direct or indirect financial or commercial benefits to designated countries or nationals thereof from the importations.

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§500.801. Licensing.***

(b) Specific licenses -- (1) General course of procedure. Transactions sub-

ject to the prohibitions contained in Subpart B of this part which are not authorized by general license may be effected only under specific license. The specific licensing activities of the Office of Foreign Assets Control are performed by the central organization and the Federal Reserve Bank of New York. When an unusual problem is presented, the proposed action is cleared with the Director of the Office of Foreign Assets Control or such person as he may designate.

(2) Applications for specific licenses. Applications for specific licenses to engage in any transaction prohibited by or pursuant to this chapter are to be filed in duplicate on Form TFAC-1 with the Federal Reserve Bank of New York. Any person having an interest in a transaction or proposed transaction may file an application for a license authorizing the effecting of such transaction, and there is no requirement that any other person having an interest in such transactions shall or should join in making or filing such application.

(3) Information to be supplied. Applicants must supply all information specified by the respective forms and instructions. Such documents as may be relevant shall be attached to each application as a part of such application except that documents previously filed with the Office of Foreign Assets Control

may, where appropriate, be incorporated by reference. Applicants may be required to furnish such further information as is deemed necessary to a proper determination by the Control. If an applicant or other party in interest desires to present additional information or discuss or argue the application, he may do so at any time before or after the decision. Arrangements for oral presentation should be made with the Control.

(4) Effect of denial. The denial of a license does not preclude the reopening of an application or the filing of a further application. The applicant or any other party in interest may at any time request explanation of the reasons for a denial by correspondence or personal interview.

(5) Reports under specific licenses. As a condition upon the issuance of any license, the licensee may be required to file reports with respect to the transaction covered by the license, in such form and at such times and places as may be prescribed in the license or otherwise.

(6) Issuance of license. Licenses will be issued by the Office of Foreign Assets Control acting on behalf of the Secretary of the Treasury or by the Federal Reserve Bank of New York, acting in accordance with such regulations, rulings

and instructions as the Secretary of the Treasury or the Office of Foreign Assets Control may from time to time prescribe, in such cases or classes of cases as the Secretary of the Treasury or the Office of Foreign Assets Control may determine, or licenses may be issued by the Secretary of the Treasury acting directly or through any person, agency, or instrumentality designated by him.